91-617

Supreme Court, U.S.
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No. 91-_____

In The

Supreme Court of the United States

October Term, 1991

The CHRISTIC INSTITUTE,
Petitioners,

versus

John HULL, Moises Nunez, Jorge Gonzalez, Adolfo Calero, Robert Owen, John Singlaub, James McCoy, Ronald Joseph Martin, Sr., Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Richard Secord, and Albert Hakim,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI OF THE CHRISTIC INSTITUTE

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QUESTIONS PRESENTED

1. Did the decision of the court of appeals, imposing sanctions in excess of $1,000,000 pursuant to Fed. R. Civ. P. 11 against the non-profit law firm of plaintiffs' attorney, squarely conflict with the decision of this Court in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S. Ct. 456 (1989)?

2. Did the decision of the court of appeals imposing sanctions under 28 U.S.C. §1927 against the law firm of plaintiffs' attorney circumvent the plain language of 28 U.S.C. §1927 and thereby conflict with decisions of this Court governing statutory construction?

3. May the law firm of a litigant's attorney be sanctioned pursuant to the "bad-faith" exception to the American Rule?

4. Under the "bad-faith" exception to the American Rule, may the law firm of plaintiffs' attorney be sanctioned in excess of $1,000,000 without a hearing and without any findings of knowledge or scienter?

PARTIES

Tony Avirgan and Martha Honey were plaintiffs in the district court and appellants in the court of appeals. They were represented in the district court by Daniel P. Sheehan, Esq. of the Christic Institute, a public-interest, non-profit law firm. Daniel Sheehan and the Christic Institute were non-party-appellants in the court of appeals. The Christic Institute is the petitioner herein. The plaintiffs are filing a separate petition, as is Daniel P. Sheehan. Appellees in the court of appeals were those listed as defendants-appellees in the caption of the case sought to be reviewed (reprinted in the appendix to this Petition at App.I, p. 1A-2A.

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The June 18, 1991 decision of the United States Court of Appeals for the Eleventh Circuit is reported at 932 F.2d 1572 and is reprinted in the appendix at App.I, p. 1A-23A. The September 9, 1991 order denying rehearing and rehearing in banc is not reported and appears in the appendix at App.I, p. 53A.

The June 23, 1988 decision of the United States District Court for the Southern District of Florida is reported at 691 F. Supp. 1357 and is reprinted in the appendix at App.I, p. 24A-30A. The February 2, 1989 order of the United States District Court for the Southern District of Florida is reported at 705 F. Supp 1544 and the clarification of that order is reported at 125 F.R.D. 189; these orders are reprinted in the appendix at App.I, p. 31A-48A; and App.I 49A-52A, respectively.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on June 18, 1991. App.I, p. 1A. The order denying petitioner's (petition for rehearing and) suggestion of rehearing in banc was entered on September 9, 1991. On August 7, 1991, Justice Kennedy signed an order extending the time to file this petition for a writ of certiorari to and including October 15, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides;

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Federal Rule of Civil Procedure involved herein is Rule 11, which provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of any attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose,

such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleadings, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. §1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

On May 30, 1984, acting in his capacity as a professional journalist, Tony Avirgan attended a press conference held by Eden Pastora, a dissident Contra leader, at La Penca, Nicaragua. Shortly after the press conference began, a bomb exploded killing at least eight people and seriously injuring many others, including Avirgan.

Immediately after the bombing, Martha Honey, Avirgan's wife, who is also a journalist, was commissioned by the Committee to Protect Journalists and the Newspaper Guild to undertake a thorough investigation of who was responsible for the bombing. Avirgan and several other journalists based in Costa Rica, later joined the investigation. Over the next year, this team conducted several hundred interviews designed to determine the identity of the bomber. In the fall of 1985, Avirgan and Honey publicly released their findings, which were contained in a written report submitted to the Committee to Protect Journalists and the Newspaper Guild. The report concluded that the bomb had been planted by an assassin named Amac Galil, who was travelling under the name of Per Anker Hansen. In addition, the report directly implicated John Hull and several other of the defendants in the assassination plot.

In October 1985, John Hull filed a criminal libel suit in Costa Rica against plaintiffs Avirgan and Honey on the basis of their report. Assisted by the Christic Institute, plaintiffs and their Costa Rican counsel successfully defended against this action by presenting witnesses corroborating the information in plaintiffs' report.

On May 29, 1986, Daniel P. Sheehan, chief counsel of the Christic Institute, filed a complaint on behalf of Tony Avirgan and Martha Honey against thirty defendants in the

United States District Court for the Southern District of Florida. Plaintiffs alleged that defendants were active and willing participants in an enterprise defined by the Racketeer Influenced and Corrupt Organization Act (hereafter RICO), 18 U.S.C. §1961 *et seq.*, members of which planned and executed the May 30, 1984 bombing directed against Eden Pastora. Federal jurisdiction was invoked under 18 U.S.C. §1964(c) and 28 U.S.C. §1331 and §1332(a)(3).

The complaint also alleged that following plaintiffs' investigation of La Penca, defendants threatened both plaintiffs with murder and physical injury, forcing them to flee Costa Rica on two occasions.

In November and December of 1986, nine defendants filed motions to dismiss the amended complaint, contending, *inter alia*, that a RICO claim had to be pled with enough specificity to show probable cause that the alleged predicate acts were committed. On December 12, 1986, Daniel P. Sheehan submitted an affidavit describing the investigation which led to the filing of the complaint and detailing some of the facts upon which the allegations in the complaint were based. Sheehan moved the court to consider the affidavit only if it found that probable cause pleading was required. On January 30, 1987, the district court denied the defendants' motions to dismiss the amended complaint, finding that plaintiffs had adequately alleged the essential elements of a RICO claim: predicate acts, a pattern of racketeering activity, and enterprise. In its order, the district court found that "the probable cause pleading requirement is not mandated" and "[t]he federal rules do not require the Plaintiff to set out in detail the facts upon which he bases his claim." It did not, moreover, once mention the Sheehan affidavit in the seventeen page order. Nonetheless, over two years after the submission of that affidavit, the district court cited it as the principal ground upon which the bad faith

finding against Daniel Sheehan was based.

In May 1988, thirteen defendants filed summary judgment motions. The court issued an opinion granting summary judgment for all defendants on June 23, 1988, three days before the trial was scheduled to begin. App.I, p. 24A. On July 22, 1988, plaintiffs filed a notice of appeal from the order accompanying that opinion.

On February 2, 1989, the district court granted fourteen defendants' motions for costs and fees (totalling $1,034,381.36) pursuant to the bad faith exception to the American Rule, 28 U.S.C. §1927 (1986) and Fed. R. Civ. P. 11. App.I, p. 31A. On February 24, 1989, the district court issued an order clarifying its original order, wherein the court ruled that Daniel Sheehan, the Christic Institute and the plaintiffs were jointly and severally liable for the entire sanction award. App.I, p. 49A. The court concluded that Sheehan and the Christic Institute were liable pursuant to Fed. R. Civ. P. 11, 28 U.S.C. §1928, and the bad faith exception to the American Rule. The sole authority for the plaintiffs' liability was the bad faith exception.

Despite submission of evidence demonstrating that the sanctions were nearly four times the net assets of petitioner Christic Institute, the district court refused to stay execution of the judgment pending appeal unless the petitioners posted a supersedeas bond in the amount of $1,211,881.36. Petitioners posted the requisite supersedeas bond, whereupon the district court entered a stay pending appeal on March 8, 1989.

On April 27, 1989, the court awarded an additional $17,297.50 in costs and fees to a fifteenth defendant. On May 25, 1989, plaintiffs filed a notice of appeal from the

district courts' three sanctions orders of February 2, February 24 and April 27, 1989.

The summary judgment and sanctions appeals were consolidated on March 22, 1989. Oral argument was held on February 25, 1991 before a panel of the Eleventh Circuit Court. On June 18, 1991, the panel issued its opinion affirming the district court's rulings on summary judgment and sanctions. App.I, p. 1A-23A. On September 9, 1991, the Eleventh Circuit denied appellants' petitions for rehearing and suggestions for rehearing in banc. App.I, p. 53A.

REASONS FOR GRANTING THE PETITION

This case presents a number of significant questions of federal law: under what conditions, if any, do 28 U.S.C. §1927 or the "bad faith" exception to the American Rule permit the imposition of sanctions against the law firm of an attorney also sanctioned under those authorities. Two years ago, the Supreme Court decided the related question of whether Rule 11 supports such a sanction against a law firm. In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S Ct. 456 (1989), this Court held that Fed. R. Civ. Proc. 11 does not authorize a court to sanction the law firm of an attorney who signs a paper in violation of Rule 11, even when the attorney explicitly signs on behalf of the firm. As in the case at bar, these three authorities (Rule 11, 28 U.S.C. §1927 and the bad-faith exception) are often used in conjunction with one another. Cf. *Chambers v. Nasco, Inc.*, ___U.S.___, 111 S. Ct. 2123, 2134 (1991). We submit that the review of this case would be a useful complement to *Pavelic* and would provide an opportunity for this Court to complete its guidance with respect to what legal authority, if any, may support sanctions against a law firm.

As to that issue there is a conflict between the circuits. Noting this Court's decision in *Pavelic*, the Fourth Circuit recently opined; ". . .we are doubtful that the other sanctions theories [28 U.S.C. §1927, Fed. R. Civ. Proc. 16 and the bad-faith exception to the American Rule] will support sanctions against an entire firm rather than against the individual lawyers who acted improperly." *Blue v. U.S. Dept. of Army*, 914 F.2d 525, 549 (4th Cir. 1990); contra *Glass v. Pfeffer*, 849 F.2d 1261, 1267 (10th Cir. 1988). We agree with the Fourth Circuit's proposition and further submit that the reasoning employed in *Pavelic* to obviate law firm liability under Rule 11 applies with equal force to the sanctioning mechanisms of

28 U.S.C. §1927 and the bad faith exception. This Court should resolve those questions authoritatively.

I. The "Plain Meaning" of 28 U.S.C. §1927 Precludes a Finding of Law Firm Liability.

In *Pavelic*, the "plain meaning" concept of statutory construction was employed to support this Court's finding that the phrase "person who signed" in the context of Rule 11, connotes the individual signer and authorizes a court to impose sanctions only against that individual. Section 1927 is even more narrowly drawn than Rule 11.

By its own terms, §1927 applies only to "[a]ny attorney or other person admitted to conduct cases in any court of the United States" who acts vexatiously to multiply a proceeding. The statute further provides that such attorney be required "to satisfy personally" the costs and attorneys' fees imposed upon others as a consequence of such conduct. Because law firms obviously cannot be admitted to the practice of law and since the statute requires the sanction to be satisfied "personally," the most reasonable reading of Section 1927 militates against its use to sanction a law firm. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980)("Unless otherwise defined, words [in a statute] will be interpreted as taking their ordinary, contemporary, common meaning. . . ."). The plain text of 28 U.S.C. §1927 supports the conclusion that the sanction of a law firm was not envisioned by its drafters. See *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Garcia v. United States*, 469 U.S. 70, 75 (1984)(when the terms of a statute are unambiguous, judicial inquiry is complete; "only the most extraordinary showing of contrary intentions would justify a limitation on 'plain meaning' of the statutory language").

II. The Rationale of "Individual Responsibility" Underlying Both 28 U.S.C. §1927 and the Bad-Faith Exception Obviates Finding of Liability Against the Law Firm Associated With An Attorney Who Is Sanctioned Under Those Provisions.

The district court based the bad-faith liability of plaintiffs' attorney, Daniel P. Sheehan, primarily upon his December 12, 1986 Affidavit. Solely on the basis of conflicting affidavits submitted by the defendants, the district court concluded that Sheehan had misrepresented facts and evidence in his affidavit. The district court proceeded to derive the liability of the Christic Institute, Sheehan's law firm, from agency principles:

> Mr. Sheehan, The Christic Institute's General Counsel, acted on behalf of the Institute. The Institute was the self-pronounced law firm representing the plaintiffs. Its attorneys carried out Mr. Sheehan's litigation strategy, and willingly participated in the litigation tactics. The Institute's name appears on all or most of the plaintiffs' filings. Moreover, because it acted through its officers, the attorneys representing the plaintiffs, the Institute must be held accountable for its agents' neglect of their continuing duty under all three authorities to avoid this frivolous lawsuit. The Christic Institute is liable for the entire award.

Avirgan v. Hull, 125 F.R.D. 189, 190 (S.D.Fla. 1989). App.I at 51A.

In *Pavelic*, this Court firmly rejected the application of the common law principles of partnership and agency to establish the liability of a law firm under Rule 11: "We are not dealing here, however, with common-law liability, but with a Rule that strikingly departs from normal common-law

assumptions such as that of delegability." *Pavelic*, 110 S. Ct. at 459. No less so than Rule 11, §1927 and the bad-faith exception depart from common law assumptions. Indeed, both §1927 and the bad faith exception are narrowly-defined exceptions to the firmly established body of common law known as the American Rule. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 269 (1975).

Each of these sanctioning mechanisms derive from the inherent power "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962); see *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1979). The sanctioning mechanisms at issue here represent the inherent power of a court to police itself as distinguished from "a court's equitable power concerning the relations between parties." *Chambers*, 111 S. Ct. at 2133. *Roadway*, 447 U.S. at 762 ("The statute [§1927] is indifferent to the equities of a dispute. . . . It is concerned only with limiting the abuse of court processes."). Common law principles of liability simply do not apply in the context of the exercise of a court's implied or inherent powers where liability is but an incident of the central goal of vindicating judicial authority.

The principle reason to apply agency law to sanction rules would be to reach the deep-pocket law firm in order to fully compensate the victim of sanctioned activity. See Restatement (Second) of Agency §161 comment a (1958). But the ultimate rationale of sanction rules is punitive, their purpose is deterrence, not reimbursement.[1] *Hall v. Cole*,

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[1] It may be argued that holding law firms liable will serve the purpose of deterrence of "frivolous" litigation by creating incentives for internal monitoring thereby resulting in the filing of fewer

412 U.S. 1, 4-5 (1973); *Cooter & Gell v. Hartmarx Corporation*, 110 S. Ct. 2447, 2462 (1990). A movant under Rule 11, Section 1927 or the bad-faith exception has no entitlement to fees or compensation. See *Cooter & Gell*, 110 S. Ct. at 2463.

As this Court stated in *Pavelic*, the purpose of Rule 11 is not reimbursement but "sanction," so as to "bring home to the individual signer his personal, nondelegable responsibility." *Pavelic*, 110 S. Ct. at 460. Accordingly, the provision "visit[s] upon [the individual signer] personally - and not his law firm - its retribution for failing in that responsibility." *Id.* This goal of individual responsibility is also dominant in §1927, as is evident in the requirement that the attorney sanctioned be required to "satisfy personally" the costs and fees.

The underlying objective of the bad-faith exception is likewise one of personal responsibility. See *Roadway*, 447 U.S. at 766; *Dow Chem. Pac Ltd. v. Rascator Maritime S.A.*,

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baseless claims. While not wholly rejecting this rationale, this Court noted in *Pavelic* that "there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership. . . ." *Pavelic*, 110 S. Ct. at 460.

This rationale of "internal monitoring" is particularly inappropriate in this case because the Christic Institute is not a conventional law firm. Only a fraction of the Institute's employees are attorneys; the Executive Director is not an attorney nor are the majority of the members of the board of the Christic Institute attorneys. It is unrealistic to expect the Institute to have the expertise to perform the policing function of ensuring the legal and factual plausibility of claims of its several attorneys.

782 F.2d 329, 344 (2d Cir. 1986)("bad faith is personal"). This responsibility is not delegable. Hence, the principles of agency cannot serve as a basis for law firm liability under either §1927 or the bad-faith exception.

III. The Court of Appeals Rendered a Decision in Direct Conflict With Applicable Decisions of This Court

In its clarification order, the district court stated that Daniel Sheehan, as lead counsel, and the Christic Institute, as the official law firm, were liable pursuant to the bad-faith exception, 28 U.S.C. §1927, and the Federal Rule of Civil Procedure 11. *Avirgan*, 125 F.R.D. at 190, App.I, p. 50A-51A. The court further explained that the award was made "coextensively," meaning that "each of these authorities, separate unto itself, support [sic] the entire award." *Id.*

The Eleventh Circuit upheld the district court *in toto*, despite our contention that imposing Rule 11 sanctions on the Christic Institute directly contravened intervening Supreme Court law. The district court opinion was rendered prior to this Court's decision in *Pavelic*. However, the Eleventh Circuit decision (rendered over a year after *Pavelic*) did not even acknowledge *Pavelic*, much less bother to distinguish it. The Eleventh Circuit simply upheld the district court's application of Rule 11 sanctions to the Christic Institute.

While it may be maintained that the Rule 11 aspect of the sanction against the Christic Institute was likely an oversight - albeit an enormously serious one - which could be easily remedied simply by reversing the award under Rule 11 while maintaining the award pursuant to the other authorities, that conclusion holds no substance here. As indicated above, petitioners maintain that neither "bad faith" nor §1927 can support the liability of a law firm on an

agency theory.[2]

But even if law firm liability were theoretically permissible under §1927 or the bad-faith exception upon a finding of bad faith, the $1,000,000 sanction in this case constituted error because the district court failed to comply with the requirements of due process. No hearing was held prior to depriving the Christic Institute of this enormous sum of money. No factual determination of the plaintiffs' purported bad-faith motive was undertaken. Indeed the Eleventh Circuit's sole finding with respect to the Christic Institute's alleged "bad faith" was the conclusory statement that "[o]n this record, we have no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings."

A. The Assessment of Such an Onerous, Bad-faith Sanction Must Comport with the Due Process Clause of the Fifth Amendment

The Fifth Amendment to the U.S. Constitution mandates that no person shall be deprived of property without due process of law. This Court has long recognized the right to a prior hearing under the due process clause of the Fifth

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[2]The Eleventh Circuit may have recognized the untenability of sanctioning a law firm on agency grounds. For, without explicitly doing so, the panel altered the legal basis of the Christic Institute's liability from the agency theory advanced by the district court to a bad-faith theory. The panel wrote: "[a] court may assess attorney's fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith. On this record, we have no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings." *Avirgan*, 932 F.2d at 1582 (citations and footnotes omitted), App.I at 22A.

Amendment. *Fuentes v. Shevin*, 407 U.S. 79 (1972). Indeed, the requirements of due process apply to deprivations of property worth far less than is at stake in this case. See, e.g., *Fuentes*, 407 U.S. at 90 (assortment of household goods, of disputed ownership, held property protected by due process clause).

In assessing the million dollar sanction against the Christic Institute, the district court was purportedly exercising its power to punish litigants who "willfully abuse judicial processes," which this Court has recognized as inherent in a court's power. *Roadway*, 447 U.S. at 766. However, *Roadway* cautioned that "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.*, at 767 (emphasis added). This Court recently reiterated this requirement; "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees. . . ." *Chambers*, 111 S. Ct. at 2136.[3]

Of course, depending upon the importance of the interest involved, due process tolerates variances in the form of the hearing. *Fuentes*, 407 U.S. at 83. The Christic Institute was admittedly afforded an opportunity to submit written oppositions to the defendants' motions for sanctions. But given the enormity of the ultimate sanction award and the subjective determinations that it should have entailed, a formal evidentiary hearing on the record was nonetheless

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[3]In *Chambers* this Court upheld a bad-faith sanction of nearly $1,000,000 against a plaintiff. However, the plaintiff in *Chambers* was accorded the full panoply of due process rights including a full briefing, a hearing, "repeated timely warnings both from [the defendant] and the court that his conduct was sanctionable," and detailed factual findings. *Chambers*, 111 S. Ct. at 2130, 2139.

mandated. As the Eleventh Circuit sitting in banc pointed out in *Donaldson*: "when a court is asked to resolve an issue of credibility or to determine whether a good faith argument can be made for the legal position taken, the risk of an erroneous imposition of sanctions under limited procedures and the probable value of additional hearing are likely to be greater. . . . The more serious the possible sanction . . . the more process that will be due." *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987)(in banc). The district court's failure to hold a hearing of any sort prior to assessing a huge punitive sanction and the panel's affirmance thereof is error of constitutional moment.[4]

The rationale for the bad faith exception is punishment. *Hall*, 412 U.S. at 5. Accordingly, the punitive sanction of over one million dollars which threatens to bankrupt the appellants is tantamount to a criminal penalty and arguably implicates the due process requirements attendant to criminal contempt proceedings, including a jury trial. "[S]uch sanctions can assume the criminal character of a fine as, for instance, when their amount is grossly disproportionate to the attorney's misconduct. Additional due process safeguards are necessary under those circumstances. Those additional safeguards should parallel the procedures provided for in Rule 42(b)." *Donaldson*, 819 F. 2d at 1563 (Johnson, J., specially concurring). But even if the district court believed a jury trial was not warranted, plaintiffs were, at a minimum, entitled to an evidentiary hearing where they could present

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[4]The error in assessing sanctions without a prior hearing was not cured by affording appellants a subsequent right to appeal with oral argument. "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. *Fuentes*, 407 U.S. at 82. Opportunity for a hearing must be provided before the deprivation at issue takes effect.

oral testimony to "contest and explain" the sanction contemplated against them. *Id.* at 1563.

IV. The Findings of Both the District Court and the Panel Were Conclusory and Insufficient as a Matter of Law.

When, as here, a district court imposes sanctions so immense under a power so amorphous as inherent authority, it must enunciate the specific findings upon which it based its opinion. *Roadway*, 447 U.S. at 767; *Dow*, 782 F.2d at 345 (award of attorneys' fees under bad-faith exception to the American Rule is not sustainable absent, *inter alia*, a high degree of specificity in the factual findings); *Rothenberg v. Security Management Co.*, Inc., 736 F.2d 1470 (11th Cir. 1984). Attorney's fees awarded on the basis of bad faith, whether pursuant to 28 U.S.C. §1927 or the bad-faith exception, require a "high degree of specificity in the factual findings of lower courts. . . ." *Weinberger v. Kendrick*, 698 F.2d 61, 81 (1982); see also *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1089 (2nd Cir. 1977). Despite these clear directives, neither the district court nor the panel's opinion contain <u>any</u> clear delineation of the conduct being sanctioned or the bad-faith motive which allegedly constituted the basis for the Christic Institute's sanction. The factual findings, such as they are, are "mere conclusory statements," and thereby insufficient. *Rothenberg*, 736 F.2d at 1472 ("In a case, such as this one, which has dragged on for more than six years and produced a voluminous record of thousands of pages, such bald assertions provide no meaningful basis for this court to review the ultimate finding of 'bad faith'.").

The panel, like the district court, appears to have simply inferred the Christic Institute's liability either from Sheehan's alleged improper conduct or from the alleged inadequacy of plaintiffs' case. But a finding of bad faith is a subjective

determination requiring findings regarding the state of the party's actual knowledge or malice. *Hall*, 412 U.S. at 5 (1972); *Rothenberg*, 736 F.2d at 1472 (determinations regarding bad faith fee awards should focus primarily on the conduct and motive of the party). Both opinions charged plaintiffs' attorney, Daniel Sheehan, with lying. However, in order to find that the Christic Institute acted in bad faith, it would be necessary to find that the Institute knew that Sheehan was lying. See *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir. 1982)("To find Safeway acted in bad faith, it would have been necessary to find that Safeway knew or believed [its employee] actually lied"); *White v. General Motors Corp.*, Inc., 908 F.2d 675, 685 (10th Cir. 1990)(". . .the sanctioning of a party requires specific findings that the party was aware of the wrongdoing."); *Browning*, 560 F.2d at 1089 (2nd Cir. 1977)(finding of bad faith requires personal awareness or responsibility for sanctioned activity). Neither the district court opinion nor that of the panel offered any evidence whatsoever to demonstrate either actual malice or willful disregard for the truth on the part of the Christic Institute.

CONCLUSION

The issue of law firm liability under the various sanction authorities is one of intense concern to the federal bar. This Court went a long way toward resolving the issue in *Pavelic*, which conclusively held that Rule 11 does not authorize a sanction award against a law firm. However, Rule 11 is employed interchangeably, often in concert, with other sanctioning mechanisms (including the bad-faith exception and 28 U.S.C. §1927) which may, as some courts have concluded, permit such liability.

Given the importance that sanctions are assuming in federal litigation, individual attorneys and law firms alike are entitled to know the contours of their potential liability for the practice of law. For this and the foregoing reasons, petitioner requests that this petition be granted.

Respectfully submitted,

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